IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 351 OF 2003

IN

SUMMARY SUIT NO. 4356 OF 2004

Nilesh N. Sayani .. Plaintiff

versus

M/s.Kumar Plastic Co. & Anr. .. Defendants

...

Mr.A.L. Thakkar i/b Thakkar & Co. for the plaintiff.

Mr.C.S. Kapadia, Raju Gawade i/b K. Ashar & Co. for the defendants.

CORAM : D.G. KARNIK,J.

DATED : 8th February 2005.

P.C.:

1. Heard the learned counsel.

2. This Summons for Judgement is taken out by the plaintiff in the suit for recovery of Rs.3,84,901/- due from the defendant no.1 firm of which the defendant no.2 is a partner.

3. The plaintiff and the defendant no.2 are cousins and their fathers are the real brothers. The plaintiff's father, the defendant's father another brother of their fathers were carrying on business in partnership in the name and style of the defendant no.1. Prior to the year 1982, a sum of over Rs.5,00,000/- was kept as a deposit by the plaintiff who was then a minor, with the defendant no.1 firm. In the year 1982 or thereabout, there was a separation in the family and the business of the defendant no.1 firm was taken over by the defendant no.2 and his family members. At that time, a part of the amount kept as a deposit by the plaintiff with the defendant no.1 was returned to the plaintiff and a sum of Rs.3,84,901/- out of the said amount deposit of the plaintiff was continued as a deposit. It is the case of the plaintiff that the said sum of Rs.3,84,901/- has not been repaid by the defendants and therefore, he has filed this suit for recovery.

4. By filing an affidavit in reply, the defendants have admitted that a sum of little over Rs.5,00,000/- was kept as a deposit by the plaintiff. They have also admitted partial repayment to the plaintiff. They have however contended that in the year 1982, when the defendant no.1 firm was reconstituted, it was agreed between the three brothers i.e. father of the plaintiff, father of the defendant and the third brother that the amount due and payable to the plaintiff would be written off from the firm. The defendants, therefore, say that they are not liable to pay any sum to the plaintiff. The learned counsel for the defendants relies upon two major circumstances which according to him, indicate that the amount was agreed to be written off. It was firstly contended that though the dissolution took place in the year 1982-83, the plaintiff did not demand the payment till the year 1994 or thereabout. The long delay of more than 12 years would indicate that the parties had agreed that the amount would be written off. Secondly, it was pointed out that during the period of subsistence of the original partnership, the plaintiff was paid

interest. After 1982-83, when the firm was reconstituted, interest payment was stopped because the amount was agreed to be written off. Though in the rejoinder, the plaintiff has claimed that the interest was paid to him till 31st March 1994, the fact is clearly belied from the plaintiff's own notice dated 22nd June 1994 wherein the plaintiff has stated that no interest was paid on Rs,3,84,901/-.

5. As against this, learned counsel for the plaintiff submits that the plaintiff and defendant no.2 are cousins and despite separation of the family, their relations were not strained. They were attending marriages and other ceremonies in each others houses and because of cordial family relations the plaintiff had not taken any action for 12 long years. Further separation of the other immovable properties at Ahmedabad was yet to take place and therefore, plaintiff chose to wait before he made a demand. Learned counsel strongly relies upon the balance sheets of the defendant no.1 firm which are annexed as Exhibit-A, B and C to the plaint. The said balance sheets for the years ending 31st March 1991, 31st March 1992 and 31st March 1993 do show that the defendant no.1 firm has disclosed in the

balance sheets the amount of Rs.3,84,901/- as due and payable to the plaintiff. These balance sheets are not denied by the defendants though a lame explanation has been offered in the affidavit in reply that though there is an agreement to write off the amount it was shown as due in the balance sheets mistakenly.

6. In my view mere delay in filing of the suit, which is, otherwise within limitation, is no ground for disbelieving plaintiffs case or granting of an unconditional leave. The second defence that the plaintiff's father had agreed to write off the deposit also does not inspire confidence for the defendant no.1 firm has continued to show the amount as liability in its balance sheets year after year.

7. Taking an overall view of the matter, it does appear that the defendant has a good or possible defence. Hence taking an overall view of the matter, it appears that the defendant should be granted conditional leave to defend the suit subject to the payment of portion of the money claimed as due. Accordingly, the defendants are granted conditional leave to defend the suit subject to their depositing

in the Court a sum of Rs.1,00,000/- within a period of four weeks. On such deposit being made, the amount shall be invested in State Bank of India or any nationalised bank of the choice of the defendants, if such choice is indicated at the time of the deposit, initially for a period of 13 months to be renewed from time to time till the disposal of the suit.

8. Suit shall stand transferred to the list of commercial causes. The defendants to file written statement within a period of one month.

D.G. KARNIK, J